No. 698.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,
Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY
(a corporation),
Defendant in Error.

Brief on Behalf of Plaintiff in Error.

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BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Facts.

Defendant in Error commenced this action to recover damages for breach of a contract of sale claimed to have been entered into by and between it and the Plaintiff in Error, at the City of San Francisco, on the 24th day of September, 1897.

The complaint alleged that under such contract the Plaintiff in Error agreed to sell to the Defendant in Error as much ALSEN'S GERMAN PORTLAND CEMENT as it should require for use in the construction of a

certain building, said cement to be furnished at the rate of $2.56 per barrel. It is alleged, further, that Defendant in Error had required and had been compelled to use 7925 barrels of said cement in the construction of said building, and that Plaintiff in Error had refused to sell and deliver any greater number than 5000 barrels, although often requested to furnish the entire amount which Defendant in Error needed for such construction, to the consequent damage of the latter in the sum of $2876.00 (Tr. pp. 6, 27).

The answer denied the contract as declared in the complaint, and in that behalf averred that the parties contracted for the price of $2.56 per barrel on 5000 barrels of said cement; and that thereupon, and before the commencement of the action, the Plaintiff in Error duly delivered said 5000 barrels at the rate of $2.56 per barrel, and in all things performed the contract on his part (Tr. pp. 10, 11).

The answer besides, by appropriate allegations, stated a counter claim against Defendant in Error for the recovery of $2265.60, the purchase price of 885 barrels of said cement at the specified rate of $2.56 per barrel, which it was conceded had been properly delivered and not paid for (Tr. pp. 13, 15, 23, 36, 58).

It appears that on September 24th, 1897, Wells, Fargo & Company, the Defendant in Error, contemplated the construction of a building in San Francisco, which was begun in that year and completed at the

very last of the year 1898. In the work of constructing this building a large quantity of cement was used (Tr. pp. 28–29, 50). Wells, Fargo & Company employed the firm of Percy & Hamilton as architects for the said building, and Mr. Percy, according to the record, was the only member of that firm who had to do with the actual work of erecting the structure (Tr. pp. 44, 52). On, and before, September 24th, 1897, Mr. William Wolff, the Plaintiff in Error, as William Wolff & Company, was engaged in the importing and commission business at San Francisco, and acted there simply as the *selling* agents and local distributors of certain building material commercially known as "Alsen's German Portland Cement". This brand of cement was not produced in the United States but made only in Germany, from which country it reached San Francisco in sailing vessels and in uncertain amounts. At times a lack of this cement existed in Europe (Tr. pp. 48, 55). It seems that on said day, Mr. Edmund Baker, representing William Wolff & Company, for the first time met Mr. George E. Gray, the gentleman who had full charge of the matter of buying cement for the building in question, and interviewed him respecting a purchase of Alsen's German Portland Cement. Both these gentlemen differ widely in their recollection of the conversation, which passed at this interview had between them, although it seems to have been but a very brief one. Neither at this conversation nor at any other time, were any plans, bids, proposals,

or specifications of any sort, relating to the work of construction, ever exhibited to Mr. Baker, or any person connected with William Wolff & Company. Immediately after such interview between Mr. Baker and Mr. Gray, the former returned to the office of William Wolff & Company and there dictated and, on the same afternoon, caused the following proposition to be delivered to Mr. Gray for Wells, Fargo & Company.

"San Francisco, California, September 24, 1897.
Colonel Geo. E. Gray,
1st Vice-President Wells, Fargo & Co., City.

Dear Sir:—Referring to the conversation the writer Mr. Baker had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo Building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents ($2.56) per barrel delivered at the building site Second and Mission Sts., in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,
(Signed) WILLIAM WOLFF & CO..
Per Edmund Baker."

Wells, Fargo & Company promptly accepted this offer (Tr. pp. 28, 33, 36, 46, 52–3, 61).

The present controversy between the parties arises upon the true construction to be given the said letter. At the trial, the Plaintiff in Error claimed that he had fulfilled its terms and conditions by a delivery of 5000

barrels of said cement, at the price named; and *in any view*, at the utmost, under this contract, the Defendant in Error could not lawfully insist upon a delivery, at the price quoted, of more than 5000 barrels, plus a small percentage of said number to cover the words "more or less". The Defendant in Error, on the other hand, maintained that a true construction of the terms of the written instrument, entitled it rightfully to demand *all* the cement that it should require for use in the erection of the building indicated (Tr. pp. 48, 49, 58–9).

The case was tried by the Court, under a written stipulation waiving a jury. The Presiding Judge construed the writing in question against the contention of Plaintiff in Error, and judgment followed in favor of the Defendant in Error, for the sum of its damages, as prayed for, less the value of 885 barrels of said cement for which it had not paid. Another suit involving the same parties and the same subject matter, but in which the position of the parties stood reversed, the Plaintiff in Error here acting as plaintiff below, was brought about the same time as the case at bar. It appears to have been a mechanic's lien suit based upon the claim for the purchase price of the 885 barrels of cement heretofore described (Tr. p 37). It is unnecessary to give the latter action further mention.

The Plaintiff in Error brings error to this Court on the question of law involved in the true construction

of an unambiguous and plain writing. The various assignments of error all point to the question lying at the very threshold of the case, "What is the true construction applicable to the letter of September 24, 1897?"

Specification of Errors.

The Plaintiff in Error herewith specifies the following errors of the Court below, upon which he relies for a review of its construction of the said writing and a reversal of the judgment herein.

1. Said Court erred in overruling defendant's objection to the following question propounded to the witness, George E. Gray: "State what your conversation was with Mr. Baker" (See Tr. pp. 30, 70–1).

2. Said Court erred in overruling defendant's objection to the following question propounded to the witness, George E. Gray: "Before offering that, Colonel "Gray, I will ask you, what, if anything, you told Mr. "Baker, preliminarily, you contemplated doing with "reference to a building, and why you were getting "these bids?" (See Tr. pp. 31–2, 71).

3. Said Court erred in overruling and denying the defendant's motion made after the introduction in evidence of "Plaintiff's Exhibit No. 1" to strike out the conversation between the witness, George E. Gray, and Edmund Baker, prior to the said letter, upon the following grounds:

(a) That the said writing is clear and unambiguous and speaks for itself.

(b) All prior negotiations and conversations must be deemed merged in said writing.

(c) The parol testimony offered and in evidence modifies and changes the said writing and agreement.

(See Tr. pp. 33, 71, 72. A typographical error appears on p. 72 in substituting "the" for "and" found on p. 33, before the word "changes".)

4. Said Court erred in refusing to allow the witness, William Wolff, to answer the following question propounded to him: "Did you reserve that amount of cement for them?" (See Tr. pp. 72, 48–9).

5. Said Court erred in granting the motion of plaintiff to strike out the following answer of witness George W. Percy: "He, (Edmund Baker) told me he was going " away to be gone some weeks; that he had caused the " entire 5000 barrels, that we should require at the " Wells, Fargo building, to be stored in the warehouse " subject to our orders". (See Tr. pp. 72–3, 50–1).

6. Said Court erred in refusing to allow the witness Edmund Baker to answer the following question propounded to him: "What did you do after you were noti- " fied by Mr. Percy that they had accepted your pro- " posal?" (See Tr. pp. 73, 54, 56).

7. Said Court erred in granting the motion of counsel for plaintiff to strike out the following answer

made by the witness Edmund Baker: " I called on Mr. " Percy as I usually did before leaving town on my " Eastern trips, and in this instance to inform " him that I was holding the undelivered quantity of " 5000 barrels for Wells, Fargo & Company, and he " said very well that was all right." (See Tr. pp. 73, 56).

8. Said Court erred in refusing to make a rule holding, (a) that the contract as plead by the plaintiff is at variance with the contract proved; (b) that the evidence before the Court did not sustain the cause of action set forth in the complaint. (See Tr. pp. 72, 46–7).

9. Said Court erred in ruling, holding and finding that on or about the 24th day of September, 1897, the defendant contracted to sell to the plaintiff as much of Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building, which the plaintiff was at the time about to erect in the said City and County of San Francisco, at the rate of $2.56 per barrel. (See Tr. pp. 73–4).

10. Said Court erred in ruling, holding and finding that the amount of cement so contracted to be sold was not restricted to any particular number of barrels. (See Tr. p. 74).

11. Said Court erred in its conclusion of law that the plaintiff was entitled to judgment against the defendant for the sum of $2876.00, less the sum of $2265.60, that is to say, the plaintiff was entitled to

judgment against the defendant in the sum of $610.40 and for its costs. (See Tr. p. 77).

Argument.

I.

The Court erred in permitting the questions propounded to witness, George E. Gray for the purpose of ascertaining what he told Mr. Baker, preliminarily, he contemplated doing with reference to the building, and why he was getting the bids, and in admitting his several answers to the effect that his object was to get the total amount of cement required for the building; inasmuch as they modify and change the plain and unambiguous written agreement between the parties. (Specifications 1, 2, 3, a. b. and c.)

In the discussion of this branch of the argument, we shall contend that the letter dated September 24th 1897, "Plaintiff's Exhibit No. 1", together with the immediate unconditional acceptance thereof, constituted the contract between the parties to the exclusion of all else.

In order successfully to maintain this proposition, it becomes essential for us to establish in the first instance that the writing is plain and unambiguous and speaks for itself.

1. At the outset, it must be allowed that the construction of a plain and unambiguous written contract is

exclusively a question of law for the Court.

Scanlan vs. *Hodges*, 52 Fed. 354, 359;
Dawes & Co. vs. *Peebles' Sons*, 6 Fed. 856;
McFadden vs. *Henderson*, 29 So. Rep. 640;
Brawley vs. *U. S.*, 96 U. S. 168, 173;
Goddard vs. *Stoddard*, 17 Wall. 123, 142.

In *Scanlan* vs. *Hodges*, 52 Fed. at p. 359, the Court said:

> "Undoubtedly, the general rule is that the question whether given written instruments constitute a contract, as well as the interpretation of such written instruments when it is determined that they do constitute a contract, belongs to the Court and not to the jury; and this rule is *as applicable to commercial correspondence* as to a formal written contract."

2. And it must be further allowed that, as was said in *Davis* vs. *Shafer* 50 Fed. p. 767,

> "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the *whole* engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." *1 Greenl. Ev.* Sec. 275.

In *Fowler* vs. *Black*, 136 Ill. at p. 373, the Court declared:

> "This principle excluded parol evidence con-

tradictory of the writing itself even though such evidence might clearly show that the *real* intention of the parties was at variance with the particular intention expressed in the written instrument. And where there is no ambiguity in the terms used, or where the language has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties and its construction is not open to oral evidence."

In *Brawley* vs. *U. S.*, 96 U. S. at p. 173, the Court said:

"Reference is made to the previous negotiations which led to the making of the contract. * * * All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it The Court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

No technical terms are found which need parol explanation.

3. This brings us, naturally, to the key question lying at the very threshold of the present controversy—a consideration of the writing, "Plaintiff's Exhibit No. 1".

Is it a plain and unambiguous writing containing the engagements of the parties, in such terms as import a legal obligation, without any uncertainty as to the

object or extent of such engagement?

Assuming that it stands as such a writing, is a true and correct construction of it, excluding the parol testimony of Mr. Gray respecting prior negotiations, opposed to the interpretation declared by the Court below?

The terms found in the writing are such as commonly appear in ordinary commercial correspondence and have a well settled legal meaning. The only argument that can possibly be advanced, in order to raise the question of an ambiguity regarding any of the words employed, would relate to the terms "about" or "more or less".

But the words "about" or "more or less", in an agreement such as the one under consideration, have a settled legal meaning.

Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 498;
Brawley vs. *U. S.*, 96 U. S. 168;
Cabot vs. *Winsor*, 83 Mass. 546, 550;
Shickle vs. *Chouteau, etc. Co.* 10 Mo. App. 241–4, (per Thompson, J.). Affirmed by adoption of Judge Thompson's opinion *in toto*, 84 Mo. 161.

It has been held that the words "more or less" are primarily for the protection of the vendor.

Am. & Eng. Encyl. Law, (1st Ed.) V. 15 p. 722;
Shickle vs. *Chouteau Co.*, 10 Mo. App. 245.

The words "more or less" added to a given quantity expressed in a contract, do not create such an ambig-

uity in its terms as to render parol evidence admissible.

Shickle vs. *Chouteau Co.*, 10 Mo. App. 242, 245;
Cabot vs. *Winsor*, 83 Mass. 546;
Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 498;
Brawley vs. *U. S.*, 96 U. S. 168.

Construction of the writing.

(*a*) Now, no ambiguity existing in the writing calling for any explanation through the medium of parol testimony, the Court below gave to it a wrongful construction.

The said Court ruled that the writing bound Wm. Wolff to sell to Wells, Fargo & Co., as much of Alsen's German Portland Cement as they should require for use in the construction of their building, at the rate of $2.56 per barrel. The Court below, apparently deemed the case of *Brawley* vs. *U. S.*, *supra*, controlling of the one at bar. The contract before the Court here, contains some words found in that of the Brawley case. The determinative words of the agreement in the present case, however, clearly distinguish it from the other contract, and bring it within the principle of the decision of this Court announced in *Budge* vs. *U. S. Smelting & R. Co.*, *supra*.

In the Brawley case, as stated in the Budge case, the view which the Supreme Court took of the particular contract there considered is set forth as follows: "The " contract was not for the delivery of any particular

" lot, or any particular quantity, but to deliver at the " post of Fort Pembina eight hundred and eighty cords " of wood, more or less, as shall be determined to be " necessary by the post commander for the regular " supply, in accordance with army regulations, of the " troops and employes of the garrison of said post, for " the fiscal year beginning July 1st, 1871. * * * " The substantial engagement was to furnish what " should be determined to be necessary by the post " commander for the regular supply for the year, in " accordance with army regulations."

In the present case, the contract consists of the aforesaid letter coupled with its unconditional verbal acceptance promptly communicated by Wells, Fargo & Co.

The letter is easily and naturally separated into two divisions, which, for convenience as well as for a better understanding of the same, may be styled the introductory part and the stating part.

The introductory part consists of the following: " Colonel Geo. E. Gray, 1st Vice President, Wells, " Fargo & Co., City. Dear Sir:—Referring to the con- " versation the writer Mr. Baker had with you this " afternoon, we take pleasure in submitting to you our " quotation on Alsen's German Portland Cement for " use in the new Wells, Fargo Building now in course " of construction."

Outside of naming the evident purpose of the entire letter, viz.: the submission of a quotation on Alsen's

German Portland Cement for the new Wells, Fargo Building, this introductory sentence plainly shows that two things were intended thereby. In the first place, it serves simply to identify the writer as the person who had previously conversed with Mr. Gray concerning Alsen's German Portland Cement. In the next place, it clearly indicates that the writer intends to submit *his* proposition to Mr. Gray for the latter's acceptance, and to merge all previous conversation and negotiation in this *final* act.

An extract from the opinion of the Court in *Shickle* vs. *Chouteau*, *supra*, becomes instructive on this point. At page 246, the opinion declared:

> "The view advanced by the defendant, that the antecedent parol proposition from the plaintiffs, as to which Mr. Fusz testified, was a part of the contract, is clearly unsound. If there had been such a previous proposal, and if it had been embodied in writing, their position would still be unsound; for it is a well-settled rule, in determining what constitutes a contract, that where a proposal is made by one party and accepted by the other party with a modification or limitation, such acceptance is, in law, a rejection of the proposal. If it stands at all, it can only stand as a new proposal. *Benj. on Sales*, sect. 39; *Hyde* v. *Wrench*, 3 Beav. 334; *Hutchison* v. *Bowker*, 5 Mee. & W. 535; *Jordan* v. *Norton*, 4 Mee. & W. 155. That was this case. The letter above set out was, in law, a rejection of any previous offer which the defendant may have made to purchase all the iron in the yard, and a withdrawal of any previous offer which the plaintiffs may have made, if any such was made, to sell the defendant all the iron in the yard."

This introductory statement does not contain language of contract—the parties do not contract anything. It is a statement, as above indicated, to identify the writer in connection with "Alsen's German Portland Cement" which was to go into the new building, and to direct the receiver's attention to the final quotation, or offer, about to follow.

(b) Then comes the stating part of the letter, setting forth the controlling clause, which described the real obligation of the promisor. "We will name you a "price for what you may require, *on* about five "thousand barrels (5000) more or less, of two dollars "and fifty-six cents ($2.56) per barrel, delivered at the "building site, Second & Mission Sts., in quantities to "be designated by you."

The provision, that the barrels should be delivered at the building site, Second and Mission Sts., in quantities to be designated by Wells, Fargo & Co., has reference only to the place and method of delivery and not to the *total* quantity required and to be used. It was purposely inserted to relieve the acceptor of the offer from the obligation of receiving all the purchased material at one time and at the option of Wm. Wolff & Co.

Budge vs. *U. S. Smelting & R. Co.*, 104 Fed. 500.

Culling then from the controlling clause the reference to the "place and method" of delivery, the remaining obligatory words relate to a named *price* for what

the acceptor may require *on* about five thousand barrels more or less.

Here is apt and fitting language binding Wm. Wolff & Co., to maintain a fixed price for what Wells, Fargo & Co., may require, *relying on*, or *concerning*, about five thousand barrels more or less. The first words seeming to grant the acceptor the right to name the quantity required are themselves *supplemented by a limitation*, within whose extent the acceptor would have the undoubted power to decide upon the amount wanted. There is no uncertainty here as to the extent of the legal obligation undertaken by the offering party. The meaning, as plain as language can make it, is that the writer offers to fix a *price* on an article produced abroad, for as much as the other party may require, on about 5000 barrels, more or less. Mr. Gray had instructed Mr. Baker to reduce his proposition to writing—obviously in order that both sides should have the best evidence of their engagements. This, Mr. Baker did in the manner set out; but only after he had returned to the office of Wm. Wolff & Co., where, it is fair to assume, must have been kept all the information and necessary data concerning the stores of "Alsen's German Portland Cement" on hand, the lots to arrive, and the true condition of the present and prospective supplies in Europe. The record makes it manifest that Mr. Baker dictated the letter at the office of Wm. Wolff & Co. (tr. p. 53).

We have previously discussed the settled legal defi-

nition of the words "about" and "more or less" in similar commercial writings relating to sales of goods, and the authorities which declare their meaning to be a question of law for the Court (*supra* pp. 12–13). In view of what has ever been the rule in this regard, the employment of such terms by the vendor must have been for his protection to allow for any slight deficiency due to shrinking in the gross amount of barrels, whether from the caking of cement, the breaking of barrel heads and staves, or what not. And the delivery of exactly 5000 barrels would in law satisfy an engagement to deliver 5000 barrels within a reasonable limit; or, if the engagement of the vendor, because of the insertion of the qualifying words "about" and "more or less", may be lawfully construed to contemplate an excess beyond the said 5000 barrels, it must needs include only such a slight excess as the Court deems will fall within a reasonable limit. It is simply idle to contend that such an excess within a reasonable limit could possibly cover the large number of 2925 barrels, in addition to the 5000 barrels expressly mentioned—that is to say, about 60 per cent. above the same. The authorities upon the subject flatly reject any such view.

But the Court below held that under the doctrines enunciated in the *Brawley case*, the true construction of this writing called upon Wm. Wolff & Co., to furnish as much "Alsen's German Portland Cement" as Wells, Fargo & Co. required for use in their new

building, at the rate of $2.56 per barrel, without any reference to the specific number of barrels mentioned; which should be regarded only as a mere estimate of the parties. We submit that the *Brawley case* does not sustain this nor any construction of the kind.

No such *determinative* words as pointed the conclusion of the Court in the *standard case* can be found in the writing in question. The determinative words in the present instance, at the risk of repetition, are plainly: "We will name you a price for what you may " require, *on* about five thousand (5000) barrels, more " or less." In order to justify its own construction, the Court below would have to introduce the phrase "the whole of" before the words "what you may require"; and, moreover, it certainly would find it absolutely necessary to render idle and inoperative the term "on" (meaning relying on or concerning) immediately preceding "about five thousand (5000) barrels more less", and to erase it entirely from the obligatory clause. This the Court may not do. And the failure to so provide any express phrase denoting a clear intent to furnish *all*, or *the whole of*, the cement, and the purposeful introduction of the limiting term "on" furnish a clear and unmistakable guide as to the true interpretation to be put upon the writing. And no sound reason can be advanced why the promisor would not have employed similar words such as the universal "all" or "the whole of", and have omitted therefrom the limiting introductory term "on", if his

intention conformed with the construction of the Court. If the intention embodied in the offer coincided with the construction placed upon the instrument by the trial Court, it would have been expressed differently.

The mere fact that in the introductory part of the letter appears the expression, "For use in the new Wells-Fargo Building", can have no material effect upon the obligatory clause which stated the quotation offered for acceptance. The cement, surely, would be intended for the building, whether or not the writing be deemed an engagement to supply any portion of the specified amount of barrels at a fixed price. In *Budge* vs. *U. S. Smelting & R. Co.*, the contract considered expressly declared that all the mining timbers were to be required and used in a particular mine, specially contemplated and designated in the contract between the parties there involved.

Finally, reading together the sentences heretofore artificially styled by us as the introductory and the stating parts of this writing and constituting the whole of it, there remains no escape from the inevitable conclusion that it formulates an engagement on the part of the suppliers of Alsen's German Portland Cement, to furnish at a named price as much thereof as the receivers may require out of a specific quantity. And upon the complete delivery of the full number of barrels expressed, both parties would occupy an equal position to enter into new and further engagements respecting the price of an article produced only abroad and arriv-

ing at San Francisco irregularly in sailing vessels, and in uncertain quantities. Besides such an interpretation keeps in harmony with justice as well as with the fair meaning of the language used. It fails to put the one party entirely within the power of the other.

In case the construction given by the Court below should prevail, however, the receivers of the foreign cement could have demanded of the suppliers as much as fifty thousand or one hundred thousand barrels just as reasonably; provided they subsequently changed the plans and specifications of the work to be performed and extended the width, height or other dimensions of the structure accordingly, in order to conform with the requirements of an enlarged business, not originally contemplated, or for some other purpose respecting the reasonableness of which they alone might determine. The Court should hesitate long before reaching such an unjust conclusion, and *then* only when no other reasonable construction of the writing may be allowed. A Court should not repudiate a just interpretation, and prefer one which places burdens upon a contracting party grossly disproportionate to those claimed for the other.

One other point deserves some attention before leaving this head of the argument. In the *Budge Case* it was decided that the Smelting & Refining Company expressly agreed to pay for about fifteen thousand lagging and for about six hundred mining timbers, and must be held bound to its express promise to pay for

the same. Although no express promise on the part of Wells, Fargo & Company to pay for about five thousand (5,000) barrels appears on the face of the writing, still an *implied* promise to pay for the same resulted from their prompt unconditional acceptance of the offer. There can be no lawful distinction between an obligation resulting from an express promise to perform and an implied one clearly established. Both are equivalent as to the extent of the legal obligation undertaken. The only difference lies in the nature of the evidence required in order to make the necessary proofs of the respective cases.

Parsons on Contract, Vol. 1 (8th Ed.), p. 6, Note 1.

An observation of Sir Montague Smith in a case which came before him is quite appropriate to the present discussion. He said:

> "In questions of difficult interpretation not only two, but frequently many constructions may be suggested. And after all there must be one true construction. And if that true construction can be arrived at with reasonable certainty although with difficulty, then it cannot properly be said that there are two meanings to the contract."

If our views prevail as to the true construction of the letter, then the Court's action in reference to it can be explained in but one of two ways. It either regarded the writing as plain and unambiguous or it did not. If it did, then the construction placed upon it, being a pure question of law, makes the error strikingly manifest. If it deemed that writing am-

biguous, which is plainly not so, then the parol testimony of Mr. George Gray of previous conversations, to the effect that he contracted for the *total* amount of the cement required for the new building, could not explain away an ambiguity which had no existence *in truth*; but it did tend, on the other hand, to modify and change the terms and legal obligation of the plain written agreement itself; and the admission of such testimony immediately became error prejudicial to the Plaintiff in Error.

In case the views and reasons urged are well grounded, the judgment should be reversed for the error committed.

II.

The Court erred (1) in refusing to permit the witness, Wm. Wolff, to answer the question: "Did you reserve that amount of cement for them?"; and (2) in refusing to permit the witness Edmund Baker to answer the question: "What did you do after you were notified by Mr. Percy that they had accepted your proposal?"

What has been heretofore said in the preceding argument assumes that the letter is plain and unambiguous, and must be construed without the aid of parol testimony in order to know the real engagement therein contained. Suppose, however, that some ambiguity exists in reference to the true engagement. In that event, we maintain that the conduct of the writer and

his acts done in relation to the very subject matter under consideration immediately upon the acceptance by the other, and long before any controversy arose, become material for the purpose of ascertaining the real intention. And from this point of view the witnesses should have been allowed to answer the questions.

In *Budge* vs. *U. S. Smelting & R. Co.*, *supra*, the conduct of the plaintiff in that case, away from the presence of the defendant, received consideration in the decision of the Court. The acts done by the plaintiff immediately after the execution of the contract, such as securing teams and cutting and hauling timbers, must have been deemed material and relevant as bearing upon the true meaning of the contract, otherwise such matters would have no proper place in the Court's opinion which dealt with this one question. For, if such particular acts were indeed immaterial and irrelevant upon that question, it would have sufficed the Court in its opinion to declare that the plaintiff there had offered to deliver all of the timbers required, as provided in the contract, and to have omitted the special details describing the conduct of the one party before there was any controversy.

See

Auzerais vs. *Naglee*, 74 Cal. 60, 67;
Block vs. *Columbian Ins. Co.*, 42 N. Y. 393;
Knight vs. *New England Worsted Co.*, 56 Mass. 271;
Chicago vs. *Shelton*, 9 Wall. 50.

III.

The Court erred (1) in striking out the answer of witness Baker as follows: "I called on Mr. Percy * * and on this instance informed him that I was holding the undelivered quantity of 5000 barrels for Wells, Fargo & Company, and he said very well that was all right;" (2) in striking out the answer of witness George W. Percy as follows: "He (Edmund Baker) told me he was going away to be gone some weeks; that he had caused the entire 5000 barrels that we should require at the Wells, Fargo & Company's Building to be stored in the warehouse subject to our orders."

The conversations alluded to occurred about December 12th, 1897, two and one-half months after the acceptance of the letter by Wells, Fargo & Company, and long before any shortage in the supply of cement became apparent to Mr. Percy, the architect for the Company, who had charge of the work.

The record shows that Mr. Percy first purchased additional cement for Wells, Fargo & Company on May 21st, 1898, more than five months after the conversation between himself and Mr. Baker relating to "Alsen's German Portland Cement" on hand for the Wells, Fargo & Company Building (Tr. pp. 45, 51).

Moreover, it appears that as soon as Mr. George E. Gray accepted the offer embraced in the letter of September 24th, 1897, he advised Mr. Percy of that fact (Tr. p. 33). From this evidence it may be fairly and

plainly inferred that the question of the cement supply was well understood by the architect employed to attend to the work of construction. We contend that he was the agent of the Defendant in Error and entrusted by it with authority to take necessary steps in order that a proper supply of cement should always be on hand, having a due regard for the existing contract with Wolff & Co.

There is no way of explaining the action of Mr. Percy during May, 1898, at the time that he secured the additional cement and had the same billed to Wells, Fargo & Company, unless he was clothed with such an authority from the very moment that Mr. Gray advised him of "Plaintiff's Exhibit A". The answers, if allowed to stand, would have been evidence to prove that the agent of Wells, Fargo & Company, its own architect, the man of all men responsible for the work of construction and whose duty arising therefrom would naturally induce him to ascertain the true meaning of the engagement of Wm. Wolff & Company, acted upon the fact that it contemplated but 5000 barrels of cement. The action of the architect during the month of December, 1897, in deciding that Wm. Wolff & Company were all right in maintaining a supply of cement up to the number of 5000 barrels must be regarded as material evidence, if it be allowed that an ambiguity in the writing should be cleared.

IV.

The Court erred in refusing to make a rule that the contract as plead by the plaintiff was at variance with the contract proved.

Plaintiff in Error presented this proposition of law to the Court for a decision during the progress of the trial. True, the proposition was only in the form of a motion for a nonsuit when the plaintiff below rested. But in case this Appellate Court adopts the view that the writing was plain and unambiguous, it constituted the only evidence containing the true engagement of the parties; and all further evidence introduced tending to vary or modify the writing became straightway immaterial, irrelevant and incompetent. We are aware of the well established doctrine that a defendant in the trial Court waives his exception to the action of the Court in overruling a motion for a nonsuit, if he then sees fit to introduce evidence on his own account. But the reason for this rule lies in the fact that frequently a *defendant* supplies a missing link in the evidence so as to make out a case for the plaintiff, where none existed at a point in the trial when the motion of nonsuit was entered and denied (*Boyle* vs. *Gassert*, 149 U. S. 17). When the reason of the said rule ceases in a particular case, we submit that the rule itself falls. The motion for nonsuit in this particular case on the ground now discussed, dealing only with the plain and unambiguous agreement became equivalent to a submission of a

proposition of law to the Court consistent with a theory of the case adopted by defendant throughout the entire trial. At any rate, the Court's refusal to accept such a proposition of law advanced, proves that it rejected and disallowed the fundamental view of the case taken by the defendant.

V.

The remaining specifications should be considered, if necessary to do so, for the purpose of reviewing error regarding a question of law made plain by the record.

We do not contend that any question of *fact as such* should be now reviewed by virtue of any of the assignments relating to the findings. We do claim, however, that in case a plain error of law has been committed, then the Court will consider it, if clearly established by the record.

These remaining specifications of error, although perhaps inartificially and unskillfully drawn, were allowed by the Judge below; and in connection with such as have been previously discussed in this brief should be regarded as sufficient to call attention here to the principal question of law for consideration—the true construction of a plain and unambiguous writing—which was understood by the Court below and both parties to be fundamental. All knew what the question was.

In *National Cash Register* vs. *Leland*, 94 Fed. page 507, the Court decided:

> "It is settled however that a plain error may be noticed by the Appellate Court though the exceptions are irregularly taken. *Wiburg* vs. *U. S.*, 163 U. S. 632, 659. Rule 11 of this Court (90 Fed. CXLVI) recognizes this principle in allowing the Court, at its option to notice a plain error not assigned. The record shows clearly that the question * * * which is the principal question left for consideration was understood by the Court below and by both the parties to be fundamental. All knew what the question was. The attention of the learned Judge had been called to it, and he had it most plainly in mind when refusing the plaintiff's requests. * * * As to the form in which the exceptions to the refusal to give the rulings requested were taken, it may be sufficient to say as was said in *Hicks* vs. *U. S.*, 150 U. S. 442, 453; 14 Sup. Ct. 144, 'The learned Judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered. *Lucas* vs. *U. S.*, 163 U. S. 612, 618.' "

It is but fair to the learned Judge of the Court below to say that, after trial and argument, he expressed the hope that this Appellate Court would be asked to pass upon the question, "What is the true construction to " be given Plaintiff's Exhibit A?"

Wherefore by reason of the errors committed and considered in the foregoing argument, we respectfully pray that the judgment be reversed.

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